BALWANT SINGH PURBA

v.

R. RAJASINGAM

HIGH COURT MALAYA, PENANG
TUAN JEFFREY TAN JC
[CIVIL SUIT NO. 22-81-86]
27 MARCH 1995

PRACTICE & PROCEDURE: *O. 32 r. 2(2) RHC - Dismissal for want of prosecution - Delay of more than 2 years to set case down for trial - Whether plaintiff's conduct contumelious - Whether delay inordinate and inexcusable - Allegation that defendant acquiesced to the delay - Whether defendant estopped from raising delay as an issue - Whether defendant prejudiced - Principles applicable.*

The defendant filed an application to dismiss the plaintiff's action for want of prosecution pursuant to O. 32 r. 2(2) of the Rules of the High Court 1980 (RHC) on the grounds that there had been contumelious conduct by the plaintiff and the defendant had been prejudiced by the inordinate and inexcusable delay in prosecuting the action.

The pleadings had closed on 21 February 1987. The summons-for-directions was filed on 17 May 1989 but was only heard on 9 September 1993 as in the interim period the Court file could not be traced and had to be reconstructed with the assistance of the plaintiff. Thereafter, the plaintiff filed his affidavit verifying list of documents on 18 April 1994 i.e. 5 months 9 days out of time and the defendant filed his 9 months and 15 days late. There was no inspection of documents and the action was not set down for trial.

The plaintiff contended that by attending before the learned Senior Assistant Registrar on 9 September 1993 and agreeing to the orders for the preparatory steps for trial, the defendant acquiesced to the delays prior to that date and was thus precluded from raising the issue of delay.

Held:

[1] There is no clear basis that a defendant's conduct debars him from striking out a claim as concepts of waiver and acquiescence are equitable and do not operate as an automatic bar but only gives rise to equitable discretionary remedies. Conduct is a factor to be taken into account by the Judge in exercising the discretion whether to strike out the claim .

[2] The defendant's conduct can be described as one of passive indifference to the time taken by the proceedings, for he compliantly drifted with the pace of the proceedings dictated to him. The steps he took in the proceedings can be expected from any prudent defendant, but not once did the defendant conduct himself as would be inconsistent with his application to dismiss for want of prosecution.

[3] The plaintiff did give an explanation for the delay i.e. the loss and reconstruction of the Court's file, a loss which the Court as lawful custodian must take certain responsibility, but where documents filed take an unusually long time to be returned, the filing party is reasonably expected to be put on enquiry that something is amiss and requires remedial action. In failing to make enquiries on the unreturned summons-for-directions earlier than 15 June 1991, the plaintiff was not just complacent but also showed little interest in the progress of his own action.

[4] Delay must be a delay in compliance with the rules of Court governing the prosecution of an action or delay in taking the procedural steps required. The reconstruction took 1 year, 8 months and 4 days, when all it required was the photostating of documents in the plaintiff's possession. Thus the plaintiff had failed to assist expeditiously in the reconstruction of a lost file, but had not failed to take prompt procedural steps required by the rules of Court in the reconstruction of the lost file.

[5] There was an unexplained delay by the plaintiff of 5 months and 9 days in filing the affidavit verifying list of documents which is deemed inexcusable. Therefore the prejudice alleged by the defendant in his affidavit is unchallenged and is deemed admitted. However it is not obvious from an isolated "act of disobedience" that the plaintiff is guilty of contumelious conduct.

[6] If the plaintiff is to be faulted entirely for the time taken, the total delay of 2 years, 1 month and 13 days in the special circumstances of the case, is not easily recognisable as inordinate delay. The action was prolonged by unwanted and unforeseen delays rather than by the indolence of the plaintiff. Furthermore, inordinate delay is not enough to strike out the plaintiff's claim for the inordinate delay must also be inexcusable and in the instant case most of the delays are excusable.

[Plaintiff to set action down for trial within 2 weeks from the date of this order failing which the action is dismissed for want of prosecution].

Cases referred to:

Ng Hee Thong v. Public Bank Berhad [1995] 1 MLJ 281 ***(refd)***
Ratnam v. Cumarasamy [1965] 31 MLJ 228 ***(refd)***
United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn. Bhd. & 3 Ors [1994] 2 AMR 32 ***(refd)***
Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 2 QB 229 ***(refd)***
Birkett v. James [1978] AC 297 ***(refd)***
Vasudevan v. V.T Damodaran & Anor. [1981] 2 MLJ 150 ***(refd)***
Toh Hock Thye & Ors. v. Toh Chwee Biow [1982] 1 MLJ 152 ***(refd)***
Thong Chuan Ching & Anor. v. Toshiba Electronic Malaysia Sdn. Bhd. [1983] 1 MLJ 254 ***(cit)***
Datuk Samy Vellu v. Karpal Singh [1989] 3 MLJ 493 ***(cit)***
Leong Seng Kiat v. Law Peng Guan & Ors. [1992] 2 CLJ 825 ***(cit)***
Te Cheng Hoi v. Peh Im Kweng [1994] 2 AMR 29-1484 ***(cit)***
Lee Chong Ah @ Lee Chong At v. Cheong Chee @ Cheong Chee Hang & 2 Ors. [1994] 3 CLJ 59 ***(cit)***
Bliss v. Lambeth, Southwark and Lewisham Health Authority [1978] 1 WLR 382 ***(refd)***
Sii Hing Kung & Anor. v. David TM Ting [1993] 1 AMR 9-337 ***(refd)***
Leong Peng Kiat v. Law Peng Guan & Ors. [1992] 2 CLJ 825 ***(cit)***
Yong Beng Credit v. Tia Chong King @ Tay Chong Keng t/a Polysan Co. [1993] 4 CLJ 502 ***(refd)***
Confidence Concrete Sdn. Bhd. v. Shimizu Peremba Sdn. Bhd ***(cit)***
Wong Sin Meng v.Wong Sam Moi [1991] 1 MLJ 277 ***(cit)***
Paxton v. Allsopp [1971] 1 WLR 1310 ***(refd)***
William C Parker Ltd. v. F.J Ham & Sons Ltd. [1972] 3 AER 1051 ***(refd)***
Wee Siew Noi v. Lee Mun Tuck [1993] 2 SLR 232 ***(refd)***
Lee Mun Tuck v. Tan Chin Kah & Anor. [1991] 2 MLJ 324 ***(refd)***
Bostic v. Bermondsey & Southwark Group Hospital Management Committee ***(refd)***
Hatter v. Port of London Authority [1971] 115 SJ 950 ***(refd)***
Roebuck v. Mungovin [1994] 1 AER 568 ***(foll)***
County & District Properties Ltd. v. Lyell [1977] [1991] 1 WLR 683 ***(refd)***
Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd. [1986] 1 MLJ 382 ***(refd)***
Overseas Investment Pte. Ltd. v. Anthony William O'Brien & Anor [1988] 3 MLJ 332 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 25, r. 1(1), O. 34, r. 2(2)

For the plaintiff - Karpal Singh (Jagdeep Singh Deo with him); M/s. Karpal Singh & Co.
For the defendant - R.R. Sethu; M/s. R. Rajasingam & Co.

JUDGMENT

Jeffrey Tan JC:

This is is an application by the defendant to dismiss the plaintiff's action for want of prosecution on grounds, that (a) there has been contumelious conduct on the part of the plaintiff and (b) the defendant is prejudiced by the plaintiff's inordinate and inexcusable delay in the prosecution of the proceedings.

The application is supported by the affidavit of the defendant sworn on 27 April 1994 wherein *inter alia* are the following pertinent points:

(a) the matters in issue are largely factual,

(b) the memories of witnesses become dim with the passage of time and both parties and witnesses would not have an accurate recollection of the events or facts,

(c) the defendant is no longer able to locate material witnesses as he is not aware of their present whereabouts, and without their evidence it would be difficult to prove his case,

(d) the period of limitation has set in,

(e) a fair trial is no longer possible, and

(f) the action has been hanging over him for far too long and is affecting his professional standing as an advocate and solicitor.

The plaintiff's answer is that:

(a) the defendant attended hearing of the summons-for-directions on 9 September 1993, and agreed to the orders preparatory for the setting down for trial without objecting to delays and is therefore precluded from raising the issue of delay,

(b) diligent and timeous steps were taken to prosecute the action, but the loss of the Court's file necessitated its re-construction and the summons-for-directions although filed could not be heard until after its re-construction.

(c) both sides had failed to comply with the directions given on 9 September 1993 for the defendant only filed his affidavit verifying list of documents some 9 months and 15 days after the time allowed and has explained his omission and default by imputing sole blame on the plaintiff.

(d) the defendant is guilty of contumelious conduct

(e) the defendant is guilty of delay in not taking timeous steps to dispose of his application to set aside the *exparte* injunction restraining the defendant from assaulting or harassing the plaintiff, and obtained by the plaintiff on 18 December 1986.

The defendant's reply is that he had no knowledge of the loss of the Court's file nor was he consulted on its reconstruction; the plaintiff has the carriage of the proceedings and any failure or delay on his part is of no consequence whatsoever, and he can take all procedural objections to defeat the plaintiff's action (*Ng Hee Thong v. Public Bank Berhad* [1995] 1 MLJ 281), and in the absence of any explanation the inordinate delay is inexcusable, and the prejudice complained but uncontroverted is deemed as admitted by the plaintiff.

The final remark from the plaintiff is that the conduct of the defendant had contributed to the overall delay which must be taken into account in the present application.

The above are the "facts" deposed to by the parties, but later on other related facts taken from the Court's file will be addressed. However, it suffices for the moment to note that:

(a) pleadings closed on 21 February 1987,

(b) summons-for-directions filed on 17 May 1989 was heard on 9 September 1993,

(c) the plaintiff filed his affidavit verifying list of documents on 18 April 1994 (9 September 1993 + 60 days) i.e 5 months 9 days out of time, while the defendant filed his 9 months 15 days late, and there is yet no inspection of documents nor is the action set down for trial.

Though not stated, it appears that the present application is made under specific provisions of the RHC 1980, and O. 34, r. 2(2) reads:

> Where the plaintiff does not, within the period fixed under para (1), set the action down for trial, the defendant may set the action down for trial or may apply to the Court to dismiss the action for want of prosecution and on the hearing of any such application, the Court may order the action to be dismissed accordingly or may make such order as it thinks just.

The defendant's opening fusillade is that rules *prima facie* to be obeyed see (*Ratnam v. Cumarasamy* [1965] 31 MLJ 228) had been ignored by the plaintiff as there was a failure to set the action down for trial within the terms of the orders given on 9 September 1993, and despite the passage of more than 8 years the action is yet not ready for trial.

Quite apart from specific provisions in the RHC 1980, the Court has an inherent jurisdiction to dismiss an action for want of prosecution if there is failure to comply with the rules or excessive delay in the prosecution of an action, but generally speaking the same principles are applicable whether the Court is acting under its express power or under its inherent jurisdiction (*United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn. Bhd. & 3 Ors.* [1994] 2 AMR 32 per Mohamed Dzaiddin SCJ at p. 1661).

The general principles that guide the Court in the exercise of that inherent jurisdiction were laid down by the English Court of Appeal in the case of *Allen v. Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229. In the House of Lords case of *Birkett v. James* [1978] AC 297, Lord Diplock who had been party to the decision in *Allen's* case summarised those principles laid down as follows. He said that the power should be exercised only where the Court is satisfied either:

(1) that the default has been intentional and contumelious e.g. disobedience to a peremptory order of the Court or conduct amounting to an abuse of the process of the Court; or

(2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and

(b) such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues or is such as is likely to cause or to have caused serious prejudice to the defendant either as between themselves and the plaintiff or between each other or between them and a third party.

That statement of law was accepted by the Federal Court in *Vasudevan v. T. Damodaran & Anor.* [1981] 2 MLJ 150 and *Toh Hock Thye & Ors. v. Toh Chwee Blow* [1982] 1 MLJ 152, and followed in numerous decisions in the High Court (see *Thong Chuan Ching & Anor. v.*

Toshiba Electronic Malaysia Sdn. Bhd. [1983] 1 MLJ 254, *Datuk Samy Vellu v. Karpal Singh* [1989] 3 MLJ 493, *Leong Seng Kiat v. Law Peng Guan & Ors.* [1992] 2 CLJ 825, *Te Cheng Hoi v. Peh Im Kweng* [1994] 2 AMR 29-1484, *Lee Chong Ah @ Lee Chong At v. Cheong Chee @ Cheong Chee Hang & 2 Ors.* [1994] 3 CLJ 59).

In the *Allen* case, Lord Diplock pointed out that the rules of Court give to the plaintiff the initiative in bringing his action on for trial, that the pace at which it proceeds through the various steps of the proceedings is within the plaintiff's control for the rules provide the machinery whereby the plaintiff can compel the defendant to take promptly those steps preparatory to the trial, which call for positive action on his part, and provide an effective sanction against unreasonable delay on the part of the defendant. Lord Diplock said:

> It is thus inherent in an adversary system which relies exclusively upon the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the Court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.

The reason for this is simple enough - the dilatory conduct of proceedings which is the postponement of a trial, and particularly in causes of action which turn on witnesses' recollection of past events until memories had faded and witnesses vanished creates a substantial risk that justice will not be done (*Birkett v. James*). Their importance depends on the circumstances, the issues and the other evidence that can be given, but prejudice is not limited to matters affecting proof; a defendant particularly a professional man, may be made prejudiced by having an action hanging over his head indefinitely (*Bliss v. Lambeth, Southwark and Lewisham Health Authority* [1978] 1 WLR 382).

While it is true that the maladies of delay will weigh more heavily on the plaintiff who after all has the onus of proving that alleged, yet the plaintiff as the actor has the burden of taking timeous steps, to compel a defendant if necessary to take the preparatory steps, and set the action down for trial expeditiously.

Although the principles laid down in *Allen's* case are clear, nevertheless, what constitutes "inordinate and inexcusable delay" or "serious prejudice to the defendant" is a matter of fact and degree and was discussed in a number of reported cases:

(a) "Inordinate" means materially longer than the time usually regarded by the profession and Courts as an acceptable period (*Birkett v. James*),

(b) what is reasonable time will depend on the facts of a particular case (*Sii Hing Kung & Anor. v. David TM Ting* [1993] 1 AMR 9-337).

The test taken by Salmon LJ in *Allen's* case was that the defendant must show:

(1) that there has been inordinate delay - it would be highly undesirable to lay down a tariff, and what is or is not inordinate delay depends upon the facts of each case, and vary infinitely from case to case, but inordinate delay should not be too difficult to recognise when it occurs.

(2) that it is inexcusable delay as a rule until a credible excuse is made out, the natural inference would be that it is inexcusable (see *Leong Peng Kiat v. Law Peng Guan & Ors.* [1992] 2 CLJ 825, *Yong Beng Credit v. Tia Chong King @ Tay Chong Keng t/a Polysan Co.* [1993] 4 CLJ 502, *Confidence Concrete Sdn. Bhd. v. Shimizu-Peremba Sdn. Bhd. (ibid) Toh Hock Thye & Ors. v. Toh Chwee Biow (ibid).*

3 points said in *Birkett v. James* to have since assumed importance but were undecided in *Allen's* case were listed as:

(1) the relevance of the fact that limitation period had not expired by the time the application to dismiss for want of prosecution was heard - in circumstances where it is likely that if the plaintiff's action was dismissed the plaintiff could avail himself of his legal right to issue a fresh writ, the non-expiry of the limitation period is generally a conclusive reason for dismissing the action that is already pending (*Birkett v. James, Wong Sin Meng v. Wong Sam Moi* [1991] 1 MLJ 277).

(2) the relevance of the period which the plaintiff had allowed to lapse before the action was brought, when this was done within the limitation period - the statute of limitations allows a plaintiff such tardiness (*Birkett v. James*), and

(3) whether the Judge ought to weigh the plaintiff's prospects of success in any remedy he might have against the solicitor if the action was dismissed, and if so, how this estimate should affect the exercise of this discretion - the prospect of the remedy against the solicitor is an irrelevant consideration (*Birkett v. James, Yong Beng Credit v. Tia Chong King @ Tay Chong Keng t/a Polysan Co.* [1993] 4 CLJ 502).

It is not proposed to run the gauntlet of cases on "prejudice", but it is worthy to mention the view of Davies LJ in his judgment in (*Paxton v. Allsopp* [1971] 1 WLR 1310 at p. 1317:)

> ...when there has been a very substantial period of delay, it is almost impossible for there not to be some prejudice to the defendant...,

and the principle followed in *Birkett v. James* but laid down in *William C Parker Ltd. v. FJ Ham & Sons Ltd.* [1972] 3 AER 1051:

> To justify dismissal of an action for want of prosecution some prejudice to the defendant additional to that inevitably flowing from the plaintiff's tardiness in issuing his writ must be shown to have resulted from his subsequent delay (beyond the period allowed by rules of Court) in proceeding promptly with the successive steps in the action. The additional prejudice need not be great compared with that which may have been caused by the time elapsed before the writ was issued but it must not be minimal; and the delay in taking a step in the action if it is to qualify as inordinate as well as prejudicial must exceed the rules of Court for taking that step.

The power of dismissal of an action for want of prosecution is arguably draconian, but there is no disagreement that it is a discretionary power see (*Vasudevan v. T. Damodaran & Anor.* [1981] 2 MLJ 150) and the Singapore Court of Appeal in *Wee Siew Noi v. Lee Mun Tuck* [1993] 2 SLR 232 even proposed that a Court exercising that discretionary jurisdiction is not bound by rigid rules.

On the following passage from the judgment of Lord Diplock in *Allen's* case:

> Since the power to dismiss an action for want of prosecution is only admissible upon the application of the defendant, his previous conduct in the action is always relevant.

Chan Hick Tin J, in *Lee Mun Tuck v. Tan Chin Kah & Anor.* [1991] 2 MLJ 324 dismissed the defendant's application as the defendant's own inordinate delay debarred her from the remedy, but on appeal (*Wee Siew Noi v. Lee Mun Tuck (ibid)*) that ground was disproved by the Singapore Court of Appeal who said:

> However as we understand it, what his Lordship spoke of in that passage was not the defendant's delay simpliciter but any conduct of the defendant which is inconsistent with his application to dismiss for want of prosecution inducing the plaintiff reasonably to believe that the defendant intends to exercise his right to proceed to trial.

When is a defendant's conduct inducing a plaintiff as will be inconsistent with his application to dismiss is elaborated in the following cases:

(a) asking for time to file the defence and repeatedly asking for particulars (*Bostic v. Bermondsey & Southwark Group Hospital Management Committee* - the 2nd appeal in the trilogy of appeals in the *Allen* case).

(b) asking for copies of medical reports, Counsel's opinion on quantum of damages and later supplying copies of the defence witnesses' statement *Hatter v. Port of London Authority* [1971] 115 SJ 950.

(c) entering into negotiations with the plaintiff and contributing to the delay by failing to file the list of documents in time see (*United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn. Bhd.* [1994] 2 AMR 32-1653).

The defendant's conduct in the proceedings was examined - the defendant (i) filed his defence and an application to set aside the *exparte* injunction but took no further steps to have the application heard, (ii) attended before the learned SAR on 9 September 1993 at the hearing of the preparatory steps for trial and (iii) filed an application to dismiss the action - but none was outside his right qua litigant.

The defendant's conduct can be described as one of passive indifference to the time taken by the proceedings, for he compliantly drifted with the pace of the proceedings dictated to him. The steps he took in the proceedings can be expected from any prudent defendant, but not once did the defendant conduct himself as would be inconsistent with his application to dismiss for want of prosecution, inducing the plaintiff to take further steps in the proceedings and incur further expense, save arguably for his attendance at the summon-for-directions hearing on 9 September 1993.

The purpose of a summons for directions is to settle the preparatory steps necessary for an action to be set down for trial. Undoubtedly, by his attendance before the learned SAR and consenting to the orders granted, the defendant on 9 September 1993 was ready and willing to proceed to trial.

It is the events after 9 September 1993 which have importance to this present application, for when the plaintiff failed (i) to file the affidavit of documents within time, (ii) to carry out the inspection of documents, and (iii) set the action down for trial, but only belatedly filed his affidavit verifying list of documents, the defendant with celerity filed the present application.

Indeed the plaintiff contends that by attending before the learned SAR on 9 September 1993 the defendant waived and acquiesced to the delays anterior to 9 September 1993, and it is now harsh and draconian to penalise the plaintiff for a short delay of 5 months and 9 days, when the defendant is similarly at fault, and where 2 parties are guilty of delay the Court should not be harsh on one party but not the other (see *Lee Mun Tuck v. Tan Chin Kah & Anor.* [1991] 2 MLJ 324).

Whether the defendant is estopped from raising the delays anterior to 9 September 1993 was comprehensively resolved by the House of Lords in the case of *Roebuck v. Mungovin* [1994] 1 AER 568. In that case it was held that where the plaintiff was guilty of inordinate and inexcusable delay which prejudiced the defendant, subsequent conduct by the defendant which induced the plaintiff to incur further expense in pursuing the action did not constitute an absolute bar preventing the defendant from obtaining an order striking out the claim, but

such conduct on the part of the defendant is a relevant factor to be taken into account by the Judge in exercising the discretion whether to strike out the claim, and the weight to be attached depends on all the circumstances of the particular case.

That decision reversed what Lord Browne-Wilkinson described as "an unpromising background against which to spell out from those judgments an absolute rule of law that even if the pre-conditions are satisfied an action cannot be struck out if the defendant's conduct is such as to amount to an estoppel" (the position held by the Court of Appeal in the case of *County & District Properties Ltd, v. Lyell* [1977] [1991] 1 WLR 683) and the House of Lords further held that there is no clear legal basis that a defendant's action debars him from striking out a claim as concepts of waiver and acquiescence are equitable and they do not operate as an automatic bar but only give rise to equitable discretionary remedies.

From *Roebuck v. Mungovin* is a statement of law that should there be further serious delays on the part of the plaintiff after the defendant's acquiescence in or waiver of the earlier delay, the whole history of the case may be taken into account in deciding whether or not the action ought to be dismissed.

Certainly, the delay (5 months and 9 days) by the plaintiff to file the affidavit verifying list of documents is serious, and adopting *Roebuck*, that opened up the whole history of the proceedings and the taking into account of all previous delays in the present application.

It is now convenient to look at the re-constructed Court's file for the history of the proceedings left unsaid by the parties:

Proceedings before 17 May 1989 (date of filing of the summons-for-directions).

Apart from the normal pleadings, the defendant filed an application to set aside the *exparte* injunction granted to the plaintiff on 18 December 1986, but that application is yet to be heard. There was an application by the plaintiff filed on 14 January 1987 to cross-examine the defendant on his affidavit dated 29 December 1986, but refused on 13 May 1987 the plaintiff filed an appeal to the then Supreme Court. The plaintiff withdrew the appeal on 24 April 1989 and on 17 May 1989 filed a summons-for-directions.

The period 17 May 1989 to 13 November 1991

On 17 May 1989, the plaintiff filed a summons-for-directions, but there is no record that a hearing date was ever given by the Court.

Re-construction of the Court's file

The Court's file was re-constructed, but there is no notandum of the date of loss or discovery of loss. There is however:

(a) the written memorandum of the learned SAR dated 17 July 1993 that she requested the plaintiff's assistance in the re-construction of the lost file.

(b) the plaintiff's solicitors' letter dated 15 June 1991 followed by reminders dated 27 June 1991, 7 August 1991, 28 August 1991, 8 October 1991 and 6 November 1991, all similarly requesting for hearing of the summons-in-chambers.

(c) the Court's reply dated 13 November 1991 to the plaintiff's solicitors' letter dated 6 November 1991, informing the said solicitors of the loss of the Court's file, together with a request for its re-construction, which letter is now reproduced below:

KS/yah/2672/86
G.S.22-01-86
13 November 1991

Tetuan Karpal Singh & Co.,
Peguambela & Peguamcara,
No: 17, Green Hall,
10200 Pulau Pinang.

Tuan,

Mahkamah Tinggi, Pulau Pinang
Guaman Sivil No: 22-01-86
Balwant Singh - Plaintif
R. Rajasingam - Defendan

Surat tuan bertarikh 6 November 1991 dirujuk.

2. Ingin dimaklumkan bahawa saya telah memberitahu Encik Balwant (plaintif) bahawa pihak kami telah gagal menjumpai fail ini walaupun telah berusaha bersungguh-sungguh untuk mencarinya.

3. Oleh yang demikian pihak kami telah mencadangkan kepada Encik Balwant untuk membina (reconstruct) file baru dengan memberi kepada kami dokumen-dokumen fotostat yang tertentu.

4. Sekiranya pihak tuan tidak berpuashati dengan penjelasan di atas, sila berjumpa dengan saya pada bila-bila masa, waktu pejabat dibuka.

Sekian, terima kasih.

'Berkhidmat Untuk Negara'

'Cintailah Bahasa Kita'

Saya yang menurut perintah,

(Julie Lack)
Penolong Kanan Pendaftar
Mahkamah Tinggi
Pulau Pinang

JL/ani.

(d) the plaintiff's solicitors' reply dated 16 July 1993 forwarding the cause papers and related correspondence in the re-construction of the lost file, which letter is reproduced below:

Karpal Singh & Company
Peguambela & Peguamcara

16 Julai 1993

Our Ref: PG KS/gr/2672/86
Your Ref: G.S. 22-01-86

Penolong Kanan Pendaftar
Mahkamah Tinggi
Georgetown
Pulau Pinang.

Puan,

Per: Mahkamah Tinggi Pulau Pinang
Suit No. 22-01-86
Balwant Singh Purba
-mlw-
R. Rajasingam

Berhubung dengan perkara tersebut di atas, surat dari Yang Arif bertarikh 13 November 1991, adalah dirujuk semula. Menurut surat berkenaan kami dimaklumkan bahawa Yang Arif tidak dapat mengesan fail Mahkamah berhubung dengan perkara yang tersebut diatas, walaupun carian telah dibuat ke atas fail Mahkamah berkenaan.

Oleh yang demikian, kami sertakan di sini salinan-salinan fotostat, "cause papers" dan correspondence di antara pejabat kami dengan pihak Mahkamah yang kini berada di dalam simpanan pejabat kami. Kami amat berbesar hati sekiranya Yang Arif dapat melakukan sesuatu bagi menyatukan semula fail Mahkamah berhubung dengan perkara yang tersebut di atas.

Kami juga berbesar hati sekiranya Yang Arif dapat menetapkan suatu tarikh perbicaraan ke atas saman untuk arahan menurut k. 25 yang difailkan oleh kami pada tarikh 17 Mei 1989 supaya kes di atas dapat diteruskan.

Sila akui penerimaannya dan terima kasih.

Yang benar,

t.t.
Karpal Singh & Co.

Lampiran-lampiran

The period 13 July 1993 to 9 September 1993

With the re-construction of the lost file, the re-submitted summons-for-directions was set down for hearing on 9 September 1993.

The period after 9 September 1993 to the date of the application to dismiss

The plaintiff filed his affidavit verifying list of documents, and the defendant filed the present application and his affidavit verifying list of documents.

As such, contrary to what is alleged by the defendant, the plaintiff did give an explanation for the delay - the loss and reconstruction of the Court's file - and that explanation was examined, as indeed were all other "delays" complained by the defendant, in the following paragraphs.

Bearing in mind the rule that a credible excuse is needed for delay and unless it is made out the inference is that it is inexcusable, the plaintiff failed inexplicably to offer any explanation for the following "delays":

(a) the period between close of pleading (21 February 1987) and the filing of the summons-for-directions (to 17 May 1989).

(b) the period between 17 May 1989 to 16 July 1993 (re-construction)

(c) the period after 9 September 1993

However, it is only an inference that delay unexplained by a defaulting party is inexcusable. A party with a grievance has an undeniable right to bring it to Court for its adjudication, but to throw a plaintiff off the carriage of his suit without adjudicating on his grievance, the Court with interest that substantive justice be done will examine the Court's file for other

inferences, just as it could in all proceedings. In an application to dismiss for want of prosecution, earlier proceedings would be taken into account to confirm or disprove the inactivity alleged in the proceedings.

From the re-constructed file, the following is found:

(a) for the period anterior to 17 May 1989, the parties were embroiled in interlocutory applications and even an appeal to the Supreme Court. The appeal was withdrawn on 24 April 1989, and soon thereafter (17 May 1989) the plaintiff filed a summons-for-directions. O. 25, r. 1(1) of the RHC 1980 required that summons be filed within one month from the date of close of proceedings, and the plaintiff was as such more than 2 years late.

However, the appeal was against a refusal for the plaintiff to cross-examine the defendant on his affidavit, the outcome of which could be decisive to the entire proceedings. A momentary pause in the proceedings then would not be infelicitous to the further conduct of the proceedings for until the disposal of the appeal the parties were hardly ready for trial. It was therefore not indolent to have deferred the summons-for-directions, and that delay was one dictated by the then pending appeal, for so soon as the pending appeal was withdrawn the summons-for-directions was duly filed, *albeit* much out of time.

(b) the summons-for-directions filed on 17 May 1989 was not given a hearing date due probably to the loss of the Court's file, a loss which the Court as lawful custodian must take certain responsibility, but none could be attributed to the plaintiff.

The first written inquiry of the plaintiff for the hearing of the summons-for-directions was on 15 June 1991, i.e. more than 2 years after it was filed.

Where documents filed take an unusually long time to be returned, the filing party is reasonably expected to inquire and is even put onto inquiry that something is amiss that requires remedial action. In failing to make inquires on the unreturned summons-for-directions earlier than 15 June 1991, the plaintiff was not just complacent but also showed little interest in the progress of his own action.

(c) for the period 13 November 1991 (the SAR's communication of the loss of the Court's file to the plaintiff) to 16 July 1993 (date of re-construction of the Court's file) the Court waited almost in vain for the plaintiff's re-construction of the Court's file.

The re-construction took 1 year, 8 months and 4 days, when all it really required was the photostating of documents in the plaintiff's possession; in not disagreeing to carry out the requested re-construction the plaintiff could be faulted for the inordinate length of time taken to accomplish that task.

In the re-construction of a lost file, Courts understandably look to the plaintiff for assistance who is after all the party seeking relief. But the plaintiff is not the only party who can assist, as the defendant also has a direct though not identical interest in an action. In the case of a defendant anxious to unload the burden of a vexatious or less than convincing claim hanging over his head, the incentive to assist in the re-construction of a lost file may even be irresistible as an early re-construction and therefore earlier vindication will be to his ultimate gain.

However, no assistance was sought from the defendant, and relying solely on the plaintiff, the re-construction, calculated from the date of the letter of the learned SAR, took 1 year 8 months and 4 days.

Delay must *ex necessitate* be a delay in compliance with the rules of Court governing the prosecution and conduct of an action or delay in taking the procedural steps required.

But the re-construction of a lost file, not entirely unforeseeable in Court proceedings, is not governed by any application rules of Court. The proceedings show the plaintiff had failed to assist expeditiously in the re-construction of a lost file, but had not failed to take prompt or timeous procedural steps required by the rules of Court in the re-construction of a lost file. The required summons-for-directions was indeed filed but was lost, and the hearing date (9 September 1993) was given only after a fresh summons-for-directions was re-submitted.

The inactivity between 17 May 1989 to 16 July 1993 was therefore enforced on the proceedings by the loss of the Court's file and its re-construction, and not by some deliberate disregard for rules, although as noted an expeditious re-construction would certainly have speeded up the pace of the proceedings. But then it can also be said that had the original summons not been lost the preparatory steps for trial would have been completed in 1989.

Specific orders for the lost file's re-construction may make a vital difference to the outcome of the present application, but where it was absent it will now be unfair to pin blame for the period of enforced inactivity entirely upon the plaintiff.

(d) there was a final delay by the plaintiff of 5 months and 9 days in the filing of the affidavit verifying list of documents, and the delay unexplained is deemed inexcusable. The prejudice alleged by the defendant in his affidavit is not challenged and is deemed admitted by the plaintiff see (*Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382 at p. 385 and *Overseas Investment Pte, Ltd. v. Anthony William O' Brien & Anor.* [1988] 3 MLJ 332).

However that failure by the plaintiff to file his affidavit in time was the one instance where there was disobedience of an order, and it is not obvious from one isolated "act of disobedience" that the plaintiff is guilty of contumelious conduct. Although in the instant case and in *Te Cheng Hoi v. Peh Im Kweng (ibid)*, the plaintiff has the benefit of an *exparte* injunction, yet it is clearly distinguishable from the contumelious conduct in *Te Cheng Hoi* where the plaintiff taking benefit of the post-injunction status quo not only prolonged the proceedings but also failed to file a statement of claim. In the instant case, the plaintiff does not unduly benefit from the *exparte* injunction as the restraining terms are rather benign, and the defendant, a senior and prominent member of the bar, will surely not do any of the things (feared by the plaintiff) even without the restraint imposed by a Court order.

With the above adumbration, and the prejudice deemed to be suffered by the defendant, the remaining question is whether the "delay" is inordinate and inexcusable.

Of the total time taken to reach the present stage of the proceedings, the "delay" imputable to the plaintiff is 1 year, 8 months and 4 days (re-construction of the lost file from 7 July 1993 to 16 July 1994) and the delay of 5 months and 9 days in the filing of the verifying affidavit, a total of 2 years 1 month and 13 days.

That total period of "delay" includes the time taken for re-construction which the plaintiff cannot be faulted entirely. If the plaintiff is to be faulted entirely for that time taken, the total delay of 2 years and 1 month and 13 days in the special circumstances of the case, is

not easily recognisable as inordinate delay. The entire time taken to reach the present stage in the proceedings is not edifying, but the pace was slowed by the unexplained loss of the Court file, exacerbated by a lack of urgency in its re-construction. The action was prolonged by unwanted and unforeseen delays rather than by the indolence of the plaintiff.

Still, 8 years from the date of filing of the writ of summons and the action is yet to be set down for trial seems inordinately too long; but inordinate delay alone is not enough to strike out the plaintiff's claim for want of prosecution, for the inordinate delay must also be inexcusable, and in the instant case most of the delay is excusable.

However, the proceedings cannot be dilated any further but need to be firmly regulated; it is therefore ordered that:

> Unless the plaintiff sets the action down for trial within 2 weeks from the date of this order and serves the required Form 64 within the time allowed by the rules, this action is dismissed for want of prosecution.

And other consequential directions.